LAW HOCK HUA & ANOR A

v.

TIMBALAN PENDAFTAR MAHKAMAH TINGGI KUALA LUMPUR & ANOR B

HIGH COURT MALAYA, KUALA LUMPUR
ROHANA YUSUF JC
[CIVIL SUIT NO: S4(S2)-21-34-2002]
10 AUGUST 2006 C

LAND LAW: *Sale of land - Sale by auction - Auction not conducted in strict compliance with terms of order for sale - Alleged loss to bidder - Whether Deputy Registrar liable for loss - National Land Code, s. 259 - Courts of Judicature Act 1964, s. 14*

CONSTITUTIONAL LAW: *Courts - Judicial immunity - Deputy Registrar - Auction sale of land - Auction not conducted in strict compliance with terms of order for sale - Whether an ultra vires exercise of power - Whether exposed to civil liabilities - Courts of Judicature Act 1964, s. 14 - National Land Code, s. 259* D E

The plaintiffs were the successful bidders at an auction held by the court pursuant to an order for sale, having bid for the property for RM352,000. The auction, however, was set aside by the High Court for reason that it was irregularly conducted. The plaintiffs were again successful at the subsequent auction, albeit having had to bid for the same property for RM447,000. The plaintiffs alleged that they had suffered losses as a result of the first defendant's failure to conduct the earlier auction in accordance with law, and in the circumstances sued the first defendant and the Government of Malaysia for special and general damages arising therefrom. Before the learned judge, the defendants pleaded judicial immunity, arguing that the first defendant was protected from civil liabilities by virtue of s. 14 Courts of Judicature Act 1964 ('CJA'). The plaintiffs countered that s. 14 CJA could not apply as the first defendant had acted in excess of her powers in changing the auction time from 9.30am to 11am. It was further argued that such conduct of the first defendant smacked of incompetence which in turn showed bad faith on the deputy registrar's part. F G H I

Held (dismissing the claim):

(1) The immunity from legal suit afforded by s. 14 CJA is to be given to either a judge or any person in the exercise of judicial duty. The key consideration is *acting judicially*. (para 12)

(2) A deputy registrar, in conducting a public auction, is exercising a judicial function under s. 259 of the National Land Code, as it involves the deputy registrar having to make a decision on successful bidders, to see that there is full compliance with the order of the court in the bidding process and to ensure that the conduct of the auction follows the terms stipulated in the order for sale. Hence, the protection under s. 14 CJA was available to the first defendant. (para 10)

(3) There is no allegation of *mala fide* in the statement of claim and the basis of the plaintiffs' claim lies strictly on the question of the first defendant's alleged negligence or incompetence. Although an attempt was made to equate negligence/ incompetence with *mala fide*, no authority was proffered to support such submission. That being so, s. 14 CJA would still protect the first defendant in discharging her judicial duty even though she might have acted *ultra vires* her power, or had not performed it within the limit of her jurisdiction. A civil claim against the first defendant is obviously unsustainable. (paras 13 & 23)

Case(s) referred to:

Anwar Hussein v. Ajoy Kumar AIR [19650] SC 1651 ***(foll)***
Garnett v. Ferrand [1827] 6 B & C 611 ***(refd)***
Indah Desa Saujana Corp Sdn Bhd v. James Foong Cheng Yuen & Anor [2005] 4 CLJ 925 HC ***(foll)***
Michael Taylor v. Canada (Attorney General) [2003] 3 FC 298 ***(refd)***
OCBC Bank (Malaysia) Bhd v. Aluran Intelek Sdn Bhd, Law Hock Hua & Anor (Interveners) [2001] 7 CLJ 381 HC ***(refd)***
Tee Yam v. Timbalan Menteri, Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2005] 6 CLJ 550 HC ***(refd)***
Sirros v. Moore & Ors [1975] 1 QB 118 ***(refd)***
Tai Choi Yu v. Ian Chin Hon Chong [2002] 2 CLJ 259 HC ***(foll)***
Tee Yam v. Timbalan Menteri, Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2005] 6 CLJ 550 HC ***(foll)***

Legislation referred to:

Courts of Judicature Act 1965, s. 14
Emergency (Public Order and Precaution of Crime) Ordinance 1969, s. 10

National Land Code, s. 259
Rules of the High Court 1980, O. 33 r. 2

Judicial Officers Protection Act 1950 [Ind], s. 1

For the plaintiffs - Maha Ramakrishnan (Sangeet Kaur & Ranee with him); M/s Karpal Singh & Co
For the defendants - Narkunavathy Sundareson SFC

Reported by WA Sharif

JUDGMENT

Rohana Yusuf JC:

[1] The plaintiffs in this action are seeking for a declaration that the setting aside of a certain public auction on 29 June 2000 was due to the failure of the deputy registrar to conduct the auction in accordance with the law. Resulting from this failure, the plaintiffs say they claim to have suffered loss and damage and they now claim special damages of RM125, 094.16 together with general damages plus interests and costs against the first defendant, for whom the second defendant is vicariously liable.

Brief Facts

[2] The Brief undisputed facts are as follows: The property described as H.S (D) 86672, No P.T 375, Mukim Damansara, Daerah Petaling, Selangor together with a factory thereon was charged to OCBC Bank (Malaysia) Bhd. as security for a banking facility. As the borrower defaulted in the repayment of the facility, the bank obtained an order for sale of the said property by public auction. The order for sale was made on 22 May 2000.

[3] The order for sale stipulated *inter alia* that;

(i) The said sale was to be held by way of public auction on 29 June 2000 at 9.30am at the auction room of the High Court at Kuala Lumpur at a reserve price of RM350,000;

(ii) Bidders at the auction ought to deposit 10% of the reserve price by way of a bank draft by 9.15am on the date of the auction and that a successful bidder had to pay full balance price within 90 days of the said auction.

[4] The plaintiffs who attended the said auction paid the requisite deposit of 10%, were successful in their bid for the property. However, certain other parties who also attended the same auction has not been allowed to bid as they had not paid the requisite deposit by the stipulated time of 9.15am although the auction was eventually conducted at 11am instead of 9.30am. One of these other parties successfully applied to set aside the auction (the 'first auction') on the ground that it had been irregularly conducted. Thereafter a second auction was conducted. The plaintiffs succeeded at the second auction to obtain the same property but at a higher price of RM447,000 as compared to their bid of RM352,000 in the first auction.

[5] At the application to set aside the first auction, the learned High Court judge held that the first auction had been irregularly conducted because the deputy registrar had acted *ultra vires* in failing to keep to the auction time stipulated in the order for sale. The learned judge also held that the deputy registrar did not have the power to vary the auction time from 9.30am to 11.00am. The case for the setting aside the first auction is reported in *OCBC Bank (Malaysia) Bhd. v. Aluran Intelek Sdn. Bhd., Law Hock Hua & Anor (Interveners)* [2001] 7 CLJ 381.

[6] As the facts of the case are not in dispute, the parties agreed that issues of whether the first defendant is protected by judicial immunity under s. 14 of the Courts of Judicature Act 1965 (the CJA) be first tried pursuant to O. 33 r. 2 Rules of the High Court 1980.

The Plaintiffs' Case

[7] The plaintiffs contended that the first defendant is liable and the second defendant vicariously liable on the ground that:

(i) The first defendant had failed to comply with the terms of the order for sale announcing the first auction;

(ii) The first defendant had failed to comply with the terms of the order for sale dated 22 May 2000; and

(iii) the first defendant had failed to conduct the first auction at the appointed time which resulted in it being declared null and void; or alternatively if the first defendant had been correct in conducting the first auction at a time later that the appointed time she ought to have allowed intending bidders to pay the requisite deposit up to 15 minutes before that later time.

[8] Counsel for the plaintiffs, Ms. Sangeet Kaur contended that the defence of judicial immunity under s. 14 of the CJA does not apply to the first defendant because the first defendant had acted in excess of her powers in changing the auction time from 9.30am to 11am. Ms. Sangeet Kaur relied on the decision of the learned judge in *OCBC Bank (M) Bhd v. Aluran Intelek Sdn. Bhd.* [2001] 7 CLJ 381 to show that it was the first defendant's acting *ultra vires* her power that had led to the setting aside of the first auction. The defendants do not dispute this. Counsel for the plaintiffs also contended in her submission that such conduct by the first defendant showed incompetence and that such incompetence according to her was equivalent to having acted with *mala fide*. Ms. Sangeet Kaur went on to contend that because the first defendant had acted with *mala fides* s. 14 of the CJA, could not provide the first defendant with judicial immunity. Although she submitted that there is case authority from other jurisdiction that supports her contention that incompetence amounts to *mala fide*, she has not been able to furnish any such authority. It was also her contention that s. 14 of the CJA, limits protection to an act which is *ultra vires* and *mala fide*, and that s. 14 CJA can only apply where there is good faith.

The Defence Case

[9] Senior Federal Council Puan Narkunavathy, on behalf of the defendants submitted that s. 14 of the CJA affords the first defendant a complete defence of judicial immunity against civil suit. At the material time the first defendant was a deputy registrar of the High Court of Malaya at Kuala Lumpur in charge of Execution Section. It was the contention of Puan Narkunavathy that the conducting of a public auction is an exercise of judicial power by a deputy registrar. In support of that contention she cited s. 259 of the National Land Code 1965 (the NLC) and pointed out that the First Defendant was in fact exercising the judicial power referred to in that section. Section 259 of the NLC states that an auction shall take place under the direction of an officer of the court. As such the conducting of an auction is part and parcel of the judicial duties of a deputy registrar. The acts of receipt of bids, summary settlement of questions arising in the course of the proceedings and concluding a sale in favour of a successful bidder are all done in the exercise of a judicial jurisdiction. That being the case s. 14 of the CJA gives a deputy registrar full protection against any legal suit. The Senior Federal Counsel contended that the protection under s. 14 against civil

suit is available to the first defendant, as she was discharging her judicial duty at the material time and that such protection applies for so long as the first defendant is acting in her judicial capacity.

Exercise Of Judicial Authority

[10] I am in total agreement with the submission of Puan Narkunavathy that the conducting of the auction is a judicial duty of the deputy registrar. I agree with her submission that a deputy registrar in conducting a public auction is exercising a judicial function under s. 259 of the NLC because it involves the deputy registrar having to make a decision on successful bidders, to see that there is full compliance with the order of the court in the bidding process and to ensure that the conduct of the auction follows the terms stipulated in the order for sale. Ms. Sangeet Kaur on behalf the plaintiffs appeared to concede on this point, as she did not propose any counter argument. Instead, she maintained that the first defendant had acted *ultra vires* her powers in this case and that therefore, the protection under s. 14 of the CJA is not available to the first defendant.

Section 14 Courts Of Judicature Act

[11] Having established that the first defendant in this case was exercising her judicial authority. I now examine whether or not an *ultra vires* exercise of a judicial power would operate to deprive the first defendant of protection against civil action under s. 14 of the CJA.

[12] Section 14 CJA provides as follows:

> Protection of judges and other judicial officers
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> 14. (1) No judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.

Section 14 above clearly provides that a judge or any person acting judicially shall not be liable to be sued in any civil court for any act done or ordered to be done in the exercise of judicial duty. It must be noted that the immunity from legal suit afforded by s. 14 is to be given to either a judge or any person in the

exercise of judicial duty. The key consideration is acting judicially and it is applicable to either a judge or any person, so long as the person is acting judicially. In *Tee Yam v. Timbalan Menteri, Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2005] 6 CLJ 550, s. 14 read together with s. 10 of the Emergency (Public Order and Precaution of Crime) Ordinance 1969 was held applicable to the members of the Advisory Board, in exercising a judicial duty. I fully agree with this decision in view of the clear wordings of s. 14 of the CJA.

[13] The next point to note from the wording of s. 14 of the CJA is that it is immaterial whether the power exercised is within the limits of the jurisdiction of the person exercising that power so long as he at that time **in good faith believes** (emphasis added) that he has such jurisdiction. Upon examining the claim of the plaintiffs, it is noted the plaintiffs' claim against the defendants as disclosed in the statement of claim is based on the first defendant's failure to comply or negligence in complying with the order for sale. The basis of the plaintiffs' claim is strictly the non compliance by the first defendant either by reasons of failure or negligence. There is no allegation of *mala fide* in the statement of claim. Even though the counsel for the plaintiffs attempted to submit on the point that the non compliance by the first defendant that incompetence should be equated with *mala fides*, she did not provide me with any authority to back up that submission nor did she build up more argument to support her contention. I will now leave aside the issue of *mala fides* and deal with the next issue of *ultra vires*. Before that, it would be important to appreciate the underlying principle of judicial immunity, under s. 14 of the CJA.

The Underlying Principles Of Judicial Immunity

[14] The principle underlying judicial immunity is well enunciated in the leading English decision cited by the *Senior Federal Counsel, Sirros v. Moore & Ors* [1975] 1 QB 118 where Lord Denning M.R had lucidly illustrated his observation on the underlying reason for judicial immunity. In his observations he said that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction that belongs to him. As such the words of a judge, the orders that he gives and the sentence he imposes are protected by an absolute privilege and cannot be a subject matter of civil proceedings against him. In the words of Lord Denning "The order which the judges gives and sentences

which he imposes cannot be the subject of civil suit against him no matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred or malice, and all uncharitableness, he is not liable to an action." Lord Denning proceeded to explain further to state that the remedy to an aggrieved lies in an appeal, to apply for *habeas corpus*, or a writ of error or *certiorari*, or to take some step to reverse the ruling. Lord Denning went on to further state that even if a judge has accepted bribes or has been corrupt, or has perverted the course of justice, he can be punished in the criminal courts; nevertheless a judge is not liable to an action for damages. The main underlying reason is to enable a judge do his duty with complete independence and freedom from fear.

[15] In an old English case, it is well stated by Lord Tenterden CJ in *Garnett v. Ferrand* [1827] 6 B & C. 611, at p. 625 that the purpose of freedom from civil action is for the sake of the public, and for the advancement of justice so that judges are free in thought and independent in judgement. In his own words he said "This freedom from action and question at the suit of an individual is given by the law to the judges not so much for their sake as for the sake of public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment as well as all who are to administer justice ought to be". The immunity from legal suit is a necessary accepted principle to uphold the independence of judicial making. It is necessary and important in order to allow a judge to do his work in complete independence and freedom from fear. A judge should not be asking himself: 'If I do this, shall I be liable in damages?' everytime he has to make a decision. Such immunity according to Lord Tenterden CJ "applies to every people, whatever his rank. Each should be protected from liability to damages when he is acting judicially ... so long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action ...".

[16] Puan Narkunavathy also cited authorities from other Commonwealth jurisdictions which echoed a similar position. The Senior Federal Counsel further contended that these cases are relevant as the creation of s. 14 of the CJA is based on all these well enunciated principles established in all these cases. Suffice it to say that the principles of judicial immunity should apply to all jurisdiction which subscribe to the doctrine of judicial independence.

[17] It can be summed up from all the above decisions that protection against civil liability is available to a judge or any person exercising a judicial duty whether or not he is doing so within his limit of jurisdiction or even *ultra vires* his power, so long as at the time such power was exercised he in good faith believed himself to have jurisdiction to do so.

[18] Malaysian judges have applied and adopted this principle which is embodied in s. 14 of the CJA. The High Court in the case of *Tai Choi Yu v. Ian Chin Hon Chong* [2002] 2 CLJ 259 in dismissing an application for extension of a writ, held that the basis of the plaintiff's claim in respect of an alleged libel contained in a written judgment was doomed to fail as the judge was exercising his judicial duty: s. 14 CJA provides him immunity from civil suit. In the High Court case of *Tee Yam v. Timbalan Menteri, Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2005] 6 CLJ 550, the learned judge stated that the purpose of s. 14 is not to protect the personal interest of a judge but rather to protect the public interest in an independent and impartial justice system.

[19] Vincent Ng J, in the latest Malaysian case on the subject in *Indah Desa Saujana Corp. Sdn. Bhd. v. James Foong Cheng Yuen & Anor* [2005] 4 CLJ 925 examined the application and ambit of s. 14 of the CJA in great detail. The learned judge referred to an authority from India where s. 1 of the Judicial Officers Protection Act 1950 is in *pari materia* with s. 14 of the CJA. In the case referred to *Anwar Hussein v. Ajoy Kumar* AIR [19650] SC 1651, the Indian Supreme Court held that if the act done or ordered is not within the limits of his jurisdiction, the judicial officers is still protected if he in good faith believed himself to have jurisdiction to do or order the act. The word jurisdiction has also been given a wide meaning in *Indah Desa* to include administrative duties. In his judgement Vincent Ng J, held that s. 14 of the CJA and the Common Law give full protection and immunity to judges even in the performance of his administrative duties. Vincent Ng J also observed that s. 14 of the CJA merely reaffirms the position in Common Law, an observation which I fully agree.

[20] It must be borne in mind that the grant of judicial immunity by s. 14 of the CJA does not mean that an affected party is without remedies. Immunity from civil action against a judicial authority under s. 14 simply means that even though one cannot sustain a civil action against a judicial authority other remedies

nevertheless remain available to the party. As observed by Lord Denning MR in the *Sirros* case, the right of appeal to reverse the decision or order, and the right to quash the decision by way of certiorari are some of the remedies. In fact his observations go even further to note that even when a criminal offence has been committed by a judicial authority, he can be subject to a criminal charge, but the liability in a civil action will not be an available action against him.

[21] As the Canadian Federal Court observed in the case of *Michael Taylor v. Canada (Attorney General)* [2003] 3 FC 298, if judges could be sued for their decisions there would be no end to disputes, and cases would take longer to be heard and resolved, thus wasting already scarce judicial resources, and at the same time judicial independence would also be severely compromised. In upholding these principles the Canadian Federal Court has also referred to Lord Denning's decision in *Sirros* case.

[22] It has been stated times and again in all the decided cases that the basis for judicial immunity is rooted in the need to protect the public but not a need to protect judges. Amongst the most important tribute that judges owe to the public are objectivity, independence and impartiality. Thus any innovative legal argument invoked against these attributes must be carefully scrutinised. It must be so, in order to ensure the public that a presiding judge is discharging his duty without having to worry, or that his decision would not be based on a dispassionate appreciation of the facts and law related to the dispute. Otherwise, he may be affected by thoughts as to which party would pose a threat of litigation. As stated by Lord Denning in *Sirros* case (at p. 785) that so long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in fact or in law but so long as he honestly believes his action to be within his jurisdiction, he should not liable.

[23] In the light of the authorities cited above and the clear wordings of s. 14 of the CJA it is my finding that the first defendant is protected by that section. The first defendant may have acted *ultra vires* her powers as found in *OCBC Bank (Malaysia) Bhd. v. Aluran Intelek Sdn. Bhd., Law Hock Hua & Anor* but s. 14 protects her in discharging that judicial duty whether or

not it is performed within the limits of her jurisdiction. As such a civil claim against the first defendant is obviously unsustainable. For these reasons the claim of the plaintiffs against the first and second defendant is dismissed with costs.

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